

State of South Dakota

NINETY-THIRD SESSION
LEGISLATIVE ASSEMBLY, 2018

972Z0190

SENATE BILL NO. 167

Introduced by: Senators Greenfield (Brock), Jensen (Phil), Nelson, Russell, and Stalzer and Representatives Pischke, Campbell, Dennert, DiSanto, Frye-Mueller, Gosch, Kaiser, Karr, Livermont, Marty, May, Steinhauer, and Wiese

1 FOR AN ACT ENTITLED, An Act to revise certain provisions regarding the consideration of
2 joint physical custody of a minor.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. That § 25-4A-26 be repealed.

5 ~~—25-4A-26. Nothing in §§ 25-4A-21 to 25-4A-27, inclusive, creates a presumption of joint~~
6 ~~physical custody. The court shall determine the appropriate physical care, custody, and control~~
7 ~~of a minor child based on a determination of the best interests of the child.~~

8 Section 2. That the code be amended by adding a NEW SECTION to read:

9 If joint legal custody is awarded, pursuant to § 25-5-7.1, there is a rebuttable presumption
10 that both parents have joint physical custody of their children. Joint physical custody of the
11 children is defined as equal parenting time. The burden of overcoming the presumption rests on
12 the parent challenging the presumption. The presumption may be overcome by demonstrating
13 that joint physical custody would not be in the best interest of the children by using the best
14 interest of the child factors or by one parent waiving the presumption. The burden of proof



1 necessary to overcome the presumption shall be by a preponderance of the evidence. If the court
2 finds that a party has overcome the presumption in favor of joint physical custody, then the court
3 shall use the best interests of the child to make a determination for custodial arrangements along
4 with the factors set forth in § 25-4A-24.

5 Section 3. That § 25-4A-24 be amended to read:

6 25-4A-24. In considering a contested request for joint physical custody, in addition to the
7 traditional factors for determining the best interests of a child, the court shall consider the
8 following factors:

- 9 (1) Whether each parent is a suitable physical custodian for the child;
- 10 (2) Whether each parent has an appropriate dwelling to support physical custody of the
11 child;
- 12 (3) Whether the psychological and emotional needs and the development of the child
13 will suffer due to lack of active contact with, and attention from, both parents if joint
14 physical custody is not granted;
- 15 (4) Whether one parent has denied, without just cause, the child the opportunity for
16 continuing contact with the other parent. Facts supporting an application of the
17 presumption in § 25-4-45.5 constitute just cause;
- 18 (5) Whether the parents can show mutual respect for and effectively communicate with
19 each other regarding the child's needs. When considering this factor, the court shall
20 include a determination of the degree to which the parents are in general agreement
21 about their approach to daily child rearing matters;
- 22 (6) The extent to which both parents actively care for the child;
- 23 (7) Whether each parent can support the other parent's relationship with the child. When
24 considering this factor, the court shall include a determination of conflict between the

1 parents, as joint physical custody requires substantial and regular interaction between
2 the parents on a myriad of issues;

3 (8) Whether the joint physical custody arrangement is in accord with the child's wishes
4 or whether the child has strong opposition to joint physical custody, taking into
5 consideration the child's age, maturity, and reason for the objection;

6 (9) Whether a parent has intentionally alienated or interfered with the other parent's
7 relationship with the child;

8 (10) Whether one or both parents are opposed to joint physical custody. A parent's
9 opposition to joint physical custody is not determinative in itself, but only one factor
10 for the court to consider;

11 (11) The geographic proximity of the parents;

12 (12) Whether the safety of the child, other children, or the other parent will be jeopardized
13 by an award of joint physical custody;

14 (13) Whether a parent allows another person custody or control of, or unsupervised access
15 to, a child after knowing the person is required to register or is on the sex offender
16 registry as a sex offender under chapter 22-24B;

17 (14) Whether a parent has attempted to influence a custody determination by alleging,
18 falsely or without good cause, that the child or the sibling of the child has been
19 subjected to physical or sexual abuse or abuse and neglect, as set forth in § 25-4-45.8;

20 (15) Whether a parent is physically and mentally capable of providing temporal, mental,
21 and moral wellness for the child;

22 (16) Whether a parent has the capacity and disposition to provide the child with
23 protection, food, clothing, medical care, and other basic needs;

24 (17) Whether a parent is willing and capable to provide the child love, affection, guidance,

1 and education in order to impart the family's religion or creed;

2 (18) Whether a parent is committed to prepare the child for responsible adulthood, as well
3 as to ensure that the child experiences a fulfilling childhood;

4 (19) Whether a parent provides exemplary modeling so that the child witnesses firsthand
5 what it means to be a good parent, a loving spouse, and a responsible citizen;

6 (20) Whether a parent provides a stable and consistent home environment including the
7 relationship and interaction of the child with the parents, stepparents, siblings, and
8 extended families;

9 (21) The extent of the child's adjustment in regards to home, school, and community;

10 (22) Whether a break in attachment with the parent whom the child has formed a closer
11 attachment would cause detriment due to the break in continuity for the child; and

12 (23) Whether a parent is guilty of misconduct that may have a harmful effect on the child.

13 Section 4. That the code be amended by adding a NEW SECTION to read:

14 A moving party shall show a substantial change in circumstance in order to modify a custody
15 decree rendered after a contested hearing. A parenting time order may be modified at any time
16 by the court or by mutual agreement between both parents.

17 Section 5. That the code be amended by adding a NEW SECTION to read:

18 The court shall require the parents to prepare and submit a parenting plan to the court
19 reflecting parental preferences and agreement on the matters of substance concerning the child's
20 education, upbringing, religious training, medical, and dental care. The parents shall share
21 decision-making authority and responsibility as to the important decisions affecting the child's
22 welfare. If parents are unable to agree, the court may order the parties to submit to a preselected
23 mediator.

24 Section 6. That chapter 25-4A be amended by adding a NEW SECTION to read:

1 A finding by the court that a parent has a history of drug or alcohol abuse or a conviction
2 related to possession or distribution of a controlled substance or marijuana, as defined in chapter
3 22-42; drug paraphernalia, as defined in § 22-42A-3 or 22-42A-4; driving while under the
4 influence, as defined in chapter 32-23; or a substantially similar federal offense creates a
5 rebuttable presumption that joint physical custody is not in the best interests of the child.